

Wind Lease Format

1. ***The proposed lease places too much risk on the contractor.***

Response: The Department is unable to respond to this broad comment. The Department has reviewed all submitted comments and provided responses.

2. ***Please specify the number of years the Land Board will entertain for the lease and for each phase.***

Response: The maximum term of forty-nine (49) years for a lease of endowment lands for wind energy development is specified in Idaho Code section 58-307. The specific term of a particular lease will be determined at the time it is offered.

3. ***The lease should include only a production fee in Phase 3.***

Response: The Phase 3 lease term is designed to provide a minimum rental payment and to allow the endowments to participate in the revenues should the Lessee benefit from use of the endowment land. The Department believes this term best serves the endowments and their beneficiaries.

4. ***The lease should have the same rental terms for Phase 1 and Phase 2.***

Response: The format does not prohibit the terms from being the same. The format is designed to provide the opportunity for variance between the rental terms where it is appropriate for the project or parcel.

5. ***The lease should include a production fee escalator during Phase 3.***

Response: Section 5.3 provides for adjustment of the Capacity Fee. The Department is willing to consider alternative provisions if you wish to make specific suggestions.

6. ***Please remove the option of a rent based upon the acreage leased.***

Response: The option of a rent based upon the acreage of property serves the endowments by providing a minimum floor for the rent received by the endowment.

7. ***Will the Land Board defer the Environmental/Pollution Insurance requirements until the initiation of construction?***

Response: The Department will defer the requirement until the initiation of activities that present a risk of pollution or environmental damage. In most leases this will be the initiation of construction.

8. ***The Environmental/Pollution Insurance amounts listed on the coversheet appear to be erroneous.***

Response: The dollar amounts will be based upon the recommendations of the Division of Risk Management for each particular site. If the lease is offered through a request for proposals, interested bidders will be allowed to comment on the proposed insurance levels within that process. The placeholder numbers in the coversheet are not intended to specify the amount for any particular lease.

9. ***The definition of Gross Annual Revenues should not include low voltage ride through equipment as it is not a separate income stream.***

Response: The lease offered by the State of Colorado and reviewed by Department Staff includes the language proposed in this lease concerning low voltage ride through equipment. It is the Department understands that a credit or rebate was offered in the past or may be proposed in the future and the specific inclusion in the definition of revenues is designed to capture this source of income or cost reduction to the Lessee. Please feel free to provide additional information as to why this language would be detrimental.

10. ***The definition of Gross Annual Revenues is too long and a shorter statement will suffice.***

Response: The Department's review of leases from other states indicated that Colorado's term most comprehensively addressed all the areas in which revenue might be generated. Please feel free to provide substitute terms for the Department to review. The Department will review any substitute language to ensure that it meets the mandate of the Idaho Constitution that the property produce the maximum long-term return to the endowment beneficiaries.

11. ***The last sentence within the definition of Gross Annual Revenues concerning the calculation of revenues where the energy produced on the leased premises is used internally or sold to a subsidiary or affiliate should be changed.***

Response: The lease offered by the State of Colorado and reviewed by agency staff includes the language proposed in this lease concerning internal use and sale to affiliates and subsidiaries. Please clarify your concerns and feel free to provide substitute terms for the Department to review.

12. ***The lessee's use of the property must be exclusive for the purpose of wind energy facilities.***

Response: Section 2.3.5 provides that other leases cannot materially interfere with Lessee's authorized use under this Lease. The Department must consider opportunities for other uses consistent with Section 2.3.5. to ensure the maximum

long term return to the beneficiaries. Please provide additional information on this issue.

13. ***Section 2.2.2 is “archaic” and does not clearly provide a right of the lessee to prevent other uses of the property from committing waste.***

Response: This language is a common term in Department leases. The Department has not experienced issues in enforcing this term. It is not the Department’s intent to authorize the Lessee to address waste by users not within the Lessee’s control (such as an agent or Sub-Lessee). Please feel free to provide a substitute term for the Department to review.

14. ***Please explain the last sentence of section 2.2.2.***

Response: The sentence prohibits excavation solely for the purpose of providing material to locations off the leased property. The language is common in Department leases and is included to prevent the use of the property as a gravel pit or any other operation where the Lessee removes resources from the property for use off of the property. Excavations of fill, gravel or other materials for use on the property will be addressed in the plans approved by the Department.

15. ***Please change the requirement that Lessee comply with the law to allow Lessee to “materially” comply with the law.***

Response: As the State of Idaho, we are hesitant to authorize a Lessee to violate the law. The Department will consider a revised term in section 3.4 concerning the remedies available to the Department for non-material violations of law to address your concern about this particular section. Please provide suggested revisions.

16. ***The remedy of forfeiture for unauthorized use of timber in section 2.3.8 is excessive and unnecessary.***

Response: This term is included in other Department leases and reflects the Land Board’s strong policy of protecting the beneficiaries’ timber resources. The Department will substitute the following term, which is consistent with the terms of the Land Board’s mineral leases:

Lessee shall notify Lessor at least six (6) months prior to cutting or removing timber on the Demised Premises. Lessee shall not remove such timber without the prior written approval of Lessor. Lessee shall pay to Lessor the value of any merchantable timber and pre-merchantable timber cut or cleared from the Demised Premises. Timber value shall be established by the Lessor using accepted fair market value approach appraisal techniques. Upon

payment by Lessee of the timber value established by Lessor, title to the timber shall pass to the Lessee.

17. ***Section 2.3.0 should be removed because there should be no public use of the property.***

Response: It is Land Board policy to allow public use of endowment land where not inconsistent with the protection of the property or the generation of income. The lease allows Lessees to identify exclusive use areas and the Department to authorize restricted use by the public where exclusive use is necessary. This term is consistent with wind energy leases of endowment lands in other states.

18. ***Please rework section 2.3.13 – Closure of Roads. A lender will have concerns about this section.***

Response: The State of Idaho has the authority to close roads under its police powers and has included this term in many Department leases with no expression of concern by lenders. The Department is willing to limit the term to the period necessary to resolve the emergency.

19. ***The due diligence terms are inappropriate. The Department should be secure in the boundaries of the property prior to lease.***

Response: The State of Idaho received endowment land at statehood and has not surveyed each piece of land. In addition, the State of Idaho cannot police every parcel of endowment land to ensure the public has not deposited hazardous substances on the property. This is particularly true of areas in which mining activities were conducted. The due diligence opportunities are within the discretion of the lessee, the Lessee's can elect to take the risks that may arise from not securing a Phase I review, a survey or a title policy. The period following the award of the lease is designed to allow potential Lessees to avoid the costs of due diligence prior to bidding.

20. ***Please explain the purpose of section 2.4.3 – Limitation of Activities.***

Response: The due diligence period occurs prior to the initiation of Phase 1 activities. This section specifies that a Lessee in a due diligence period is authorized only to conduct due diligence activities and not to begin operations or other activities. The Lessee must return the property in the same condition as received if the lease is cancelled under 2.4.2, except for acts of third parties that are beyond the control of the Lessee and damage reasonably arising from due diligence activities.

21. ***Please revise section 3.3 by correcting reference to the maximum length of phases as set forth in article IV and moving the language declaring a default for the failure to transition to Phase 2 in a timely manner to section 3.4.2.***

Response: The Department will make the suggested revisions.

22. ***Please revise section 3.4.2(B)(1) by allowing thirty days for payment of rent***

Response: The Department will make the suggested revisions.

23. ***It is not possible to complete baseline wind studies, engineering, planning, power purchase agreement negotiation and permitting within twenty-four months. Please revise accordingly.***

Response: The Department will revise the maximum period in section 4.1.3 to thirty-six months but is not willing to provide for an open-ended time frame. Section 4.1.3 provides the opportunity for the Land Board to extend the period further. Please note the Land Board and the Department are required to obtain the maximum long term return for the endowment beneficiaries and cannot tie up property where the development of revenue-producing facilities is not proceeding with due diligence.

24. ***Please delete the following from section 4.3.1 and 4.4:***

If the Lessor, in good faith, believes that Lessee has violated or failed to obtain any Government Approval necessary for activities during Phase 3 of this Lease, Lessor shall have the right, without limitation, to require Lessee to cease activities related to such violation until the violation has been remedied to the satisfaction of Lessor in its sole discretion.

Response: The Department requests additional information regarding these concerns leading to this request before modifying the lease. The Land Board will reserve authority to halt activities where the State of Idaho, the applicable endowment, or the Demised Premises are placed at an increased risk if activities continue. The Department is, however, willing to consider a revised language.

25. ***Please clarify the terms “convert” and “deliver” in sections 4.3.3(B) and (C).***

Response: These terms mirror terms used by other states, and no definitions are offered in such leases. For example, the State of Washington lease reviewed by the Department defines “commercial operations” as commencing with the delivery of electricity produced by the project and concluding when the delivery of electricity ceases for more than four months. Similarly, the State of Texas defines “commercial production” as the wholesale production and delivery of wind energy. The Department will consider revised language to specify when the operations period concludes.

26. ***Please consider using the same terms as used in the geothermal leases for the events concluding phase 3.***

Response: The statutory provisions concerning geothermal leases differ from those governing wind energy leases. Please provide specific revisions and the Department will consider whether such terms are appropriate for wind energy leases.

27. ***Section 5.3 should be revised to address regulated utilities that do not sell power to other users.***

Response: Please see the definition of Gross Annual Revenues.

28. ***The intermittent nature of wind prohibits the pre-payment of rent.***

Response: This term and the provisions of the cover sheet calculate rent as the greater of three different rent calculations. The first is based upon the name plate capacity of the facilities, the second is based upon the Gross Annual Revenues during the prior lease year, and the third is based upon the acreage leased. None of the three bases of rent are inhibited by the intermittent nature of wind.

28. ***Please change the rent payments so they are not a pre-payment of rent.***

Response: Idaho Code section 58-305 requires pre-payment of rent.

29. ***Please change the Capacity Fee to a sliding scale with a minimum and a maximum fee.***

Response: Please explain why the beneficiaries of the endowment should not benefit from an increase in the Gross Annual Revenues from endowment land under a long-term lease that limits additional revenue that can be produced for their benefit.

30. ***Can phase 4 rent continue to use the calculation process for phase 3 rent?***

Response: The Department will consider, on a case-by-case basis, if this change will produce a better return for the beneficiaries.

31. ***Please explain the purpose of section 5.5.***

Response: The Department anticipates that some leases will be developed in multiple phases and that some portions of the property will not be used for wind energy purposes. This term is designed to produce the greatest revenue for the endowment while allowing Lessee's to develop the property as is most appropriate for their business plan.

32. ***Please reduce the time that the Lessee is required to keep books from seven years to three years.***

Response: The Department sees no compelling reason to make ~~will not make~~ the suggested revision. There might be circumstances when it would be necessary to keep books for more than three years.

33. ***Please remove the following language from section 5.8. The language may cause difficulty with lenders.***

The amount of Rent, late charge, and interest shall constitute a lien in favor of the State of Idaho against all of the Lessee's property on the Demised Premises, including but not limited to Wind Energy Facilities and Improvements.

Response: The Department has used this language in many leases and has not encountered concerns from lenders. If difficulties occur, the Department can address them on a case-by-case basis.

34. ***Please revised section 6.2.5 to require disclosure of only approvals that are known or should have been known to Lessee.***

Response: The Department has no concerns and will make this change.

35. ***The Development Plan should be divided into two plans: one for testing and one for construction and operation.***

Response: The Department anticipates that the components of the Development Plan will be submitted as set forth in Article IV and updated as the lease work proceeds but no less than annually. Please feel free to submit revised language if you do not feel this process is adequately addressed.

36. ***Please delete section 7.2 – Removal. The lessee needs to be able to remove facilities at any time and the Endowment is protected by the capacity fee.***

Response: The Department will not delete this section and does not concur that the endowment is necessarily protected by the Capacity Fee. Lessees must obtain approval for removal of facilities through the planning process. The Lessee can submit a revised plan for approval when its business needs require changes.

37. ***Please remove the restoration requirements in section 7.5.2 and the application of insurance proceeds section 7.5.3. Lenders need to choose what to do with the insurance proceeds and the endowment is protected by the capacity fee.***

Response: These terms are consistent with the Department's other surface leases and lenders have not raised concerns about the terms. The Department is not entering into this lease merely to produce acreage rent. The facilities must be rebuilt to ensure the property produces revenue. The acreage fee is designed to be a floor of the rent and not a substitute for the receipt of a portion of the wind

energy revenue. Also, the failure to rebuild the facilities can cause the premature transition to Phase 4 under section 4.3.3.

38. ***Section 8.1.2 should give some flexibility in the security to be provided.***

Response: Section 8 gives significant flexibility to provide bonds, letters of credit or cash deposits.

39. ***Section 8.2 – Construction Security is not beneficial. Lessor is “first in line to be paid rent.”***

Response: The Department believes this section is of benefit to the endowment and the term is not unusual for surface leases of endowment land. The damages from a failure to complete a construction project or the failure to adequately pay contractors and suppliers can far exceed rent.

40. ***Please specify that reclamation security is not required until the commencement of construction.***

Response: The Department will clarify that reclamation security is not required until the commencement of activities that will require reclamation.

41. ***Section 3.3 – Operating Security is not beneficial because the endowment is “first in line to be paid rent” and because it imposes a needless expense on the lessee.***

Response: The Department believes this section is of benefit to the endowment and the term is not unusual for surface leases of endowment land where rent is based upon revenue.

42. ***The language in section 9.1.1(B) concerning an endorsement acceptable to lessor is not defined.***

Response: This is a routine term recommended by the Division of Risk Management. There are many instances in which the Division of Risk Management may require revisions to an endorsement. The acceptance of an endorsement is subject to the general requirement of reasonableness because it is not specifically identified as subject to the Department’s sole discretion.

43. ***Will the Land Board’s insurance requirements be revised to account for issues arising from recent turmoil in the financial markets?***

Response: The Department cannot predict how the recent turmoil will change the business landscape; however, the terms concerning the rating of Lessee’s insurance providers and state licensing are designed to address the financial viability and regulatory compliance of such firms.

44. ***Please remove the requirement in section 9.1.1(C) that the lessee purchase business income and business interruption insurance.***

Response: The Department has an interest in requiring the Lessee to obtain business interruption insurance to ensure that the Lessee can avoid bankruptcy in the event of an interruption in operations and that Lessee can continue minimum lease payments. The endowment is likely to lose significant income in the event the lease is prematurely concluded.

45. ***The workers' compensation coverage requirement is too low.***

Response: The minimum limit is set by the Division of Risk Management as a floor and not a cap. The Department has consulted with the Division of Risk Management and they recommend a minimum of \$500,000/\$500,000/\$500,000. The lease will be changed to include this recommendation.

46. ***Please change the time period for providing copies of insurance policies and certificates evidencing renewal of policies to thirty days.***

Response: The Department has no concerns and will make these requested changes.

47. ***There should be a mutual indemnification term.***

Response: The State of Idaho is prohibited from providing indemnification pursuant to Idaho Constitution Article VII section 11, Idaho Code section 67-3521 and Idaho Code sections 59-1015. Such a term is void pursuant to Idaho Code section 59-1016 and penalties are imposed on public officials who attempt to bind the state to such a term under Idaho Code section 59-1017.

48. ***Please modify section 10.1 by removing language specifying that a permitted mortgage must be for the construction or a permanent mortgage loan and substitute the language "related to construction and operation"***

Response: The Department has no concerns and will make the requested change.

49. ***Please remove section 10.1(c) as lessee has only a leasehold interest.***

Response: The Department has not experienced difficulty in requiring such a statement in permitted mortgages in the past and will address lender concerns on a case-by-case basis.

50. ***Article X does not work with the way wind energy projects are financed.***

Response: The Department has used this term in a variety of situations. Please provide additional information and specific concerns and the Department will consider the matter further.

51. ***Please change section 13.2 to require only material compliance with environmental laws.***

Response: Please see answer to Question 15.

52. ***The prior approval of assignments and sub-leases by the Land Board “will not fly.”***

Response: As the trustee of the endowments, the Land Board will retain its right to consent to a sub-lease or assignment.

53. ***Please change the standard for granting consent to sub-leases and assignments require reasonableness rather than retaining the right to disapprove in the Land Board’s discretion.***

Response: The Department will make this change.

54. ***Please allow pre-approval of certain types of assignments.
Please include language in the lease allowing certain types of assignments.***

Response: Nothing in this term prevents the submission of pre-approval for certain types of assignments and the Department will consider these submissions.

Request for Proposals

1. ***Please insert all available wind and atmospheric data concerning the site at section 1.2.***

Response: The Department intends to include all available information in this section of the RFP.

2. ***Please engage an independent consultant to review the suitability of the site and provide such information at section 1.2.***

Response: The Department will make a determination on whether to engage a consultant on a case-by-case basis.

3. ***The Notice of Interest and Distribution of Addenda section at 1.5 is “not pertinent to the RFP and can be deleted.”***

Response: The Department intends to follow an open and competitive process when issuing an RFP and this section is vital to such a process.

4. ***The project summary required by section 2.3 should include only an anticipate layout of turbines along with possible turbine alternatives and anticipated power generation. All other details including locations for transmission, substations, maintenance buildings, road systems, regulatory requirements, engineering and costs are outside the scope of the RFP.***

Response: The Department must consider the full extent of the proposed development to accurately assess the return for the endowments. For example, one development proposal may limit the use of the property for grazing more extensively than another and the Department must consider the loss of grazing royalties in determining which proposal provides the best return to the endowment.

5. ***Please delete subsections 2.3(C) to (E). Requiring this information in the RFP stage is too onerous and appears to be designed to reduce risk by requiring detailed operating information in the RFP.***

Response: Please see answer to question number 5. The requested information is necessary to accurately assess the return to the endowments under each proposal.

6. ***Section 2.4 should be deleted and the information concerning site access provided by the Department.***

Response: Information concerning existing access will be provided under section 1.2. Proposers must discuss how they will access the site for the Department to accurately assess the return to the endowments under each proposal.

7. ***Section 2.5 should be deleted and the Department should provide information concerning environmental impacts to the site, including information on threatened and endangered species on the site.***

Response: Information concerning known impacts of development will be provided under section 1.2. Proposers must discuss impacts known or anticipated by the Proposer for the Department to accurately assess the return to the endowments under each proposal.

8. ***Section 2.6 should be deleted and the Department should provide information concerning access to water on the site.***

Response: Information concerning known water rights will be provided under section 1.2. Proposers must describe their water needs and their plan to meet those needs for the Department to accurately assess the return to the endowments under each proposal.

9. ***Section 2.8 anticipates excessive Department control over the respondent.***

Response: The Department believes the information is necessary for the proper exercise of its fiduciary duties to the endowments.

10. ***The requirement that key personnel cannot be changed without Department approval should be removed from section 2.8 and should not be included in the Lease.***

Response: As with the majority of public sector RFP's, The Department will incorporate the RFP into the resulting agreement and the terms of the RFP become a part of the agreement. If the RFP is not incorporated, a key employee term will be added to the Lease.

It is routine in public agreements to require pre-approval of replacement key personnel where a contract is awarded based upon a specified line-up of personnel. This practice arose in response to vendors who specified certain personnel to obtain additional points during review of their proposal and then replaced those personnel with less qualified individuals soon after award of the contract.

11. ***Please revise the reference requirement in section 2.8(A)(3) to request only three references.***

Response: Three references are acceptable however we reserve the right to contact others if warranted.

12. ***Please delete the requirement in section 2.8(A)(6) requiring the disclosure of consultants, contractors and sub-contractors. Subcontractors are not responsible for the final product, subcontractors will be evaluated as the project progresses, and the Lessee may change contractors as the project progresses.***

Response: The Department will evaluate subcontractors in a manner similar to Proposers if the subcontractor will be providing more than tangential services. A subcontractor clause has been added to the Lease to require pre-approval of replacement subcontractors in certain circumstances. The basis of this term is similar to the basis discussed in the answer to question 10.

13. ***Items 1, 2 and 4 in section 2.8(B) should be consolidated under a single requirement of a current financial statement.***

Response: The financial information requirements are drafted to account for the wide variety of potential proposers. If the information is available in a single document that has already been prepared for a Proposer, the proposal can simple answer each item with a specific reference to the location of the information in such document.

14. ***Please delete item 2.8(B)4.***

Response: The Department will evaluate the requested information. Please provide more information as to why the information cannot be provided to the Department.

15. ***Please delete item 2.8(B)5 because the information is available without authorization.***

Response: The State of Idaho routinely requires written authorization for the collection of such information. Please provide information concerning the detriment to Proposers in providing written authorization.

16. ***Please delete section 2.9(A) because the projections are “meaningless.”***

Response: The Department will evaluate the requested information provided by Proposers. Projections without basis will be evaluated accordingly.

17. ***Please delete section 2.9(B) because Proposers have not determined the sources of capital and the information is thus “meaningless.”***

Response: The Department will evaluate the plan of capitalization provided by Proposers. Proposers without firm capitalization will be evaluated accordingly.

18. ***The evaluation process in section 3 is subjective. Please delete references to “points” in the evaluation process, provide the evaluation criteria, and consolidate the evaluation information in a smaller section.***

Response: The State of Idaho routinely and successfully evaluates proposals using a points system. The Department has adopted this system for the wind lease RFP format. If a specific RFP will use a different process, the RFP documents will be revised.